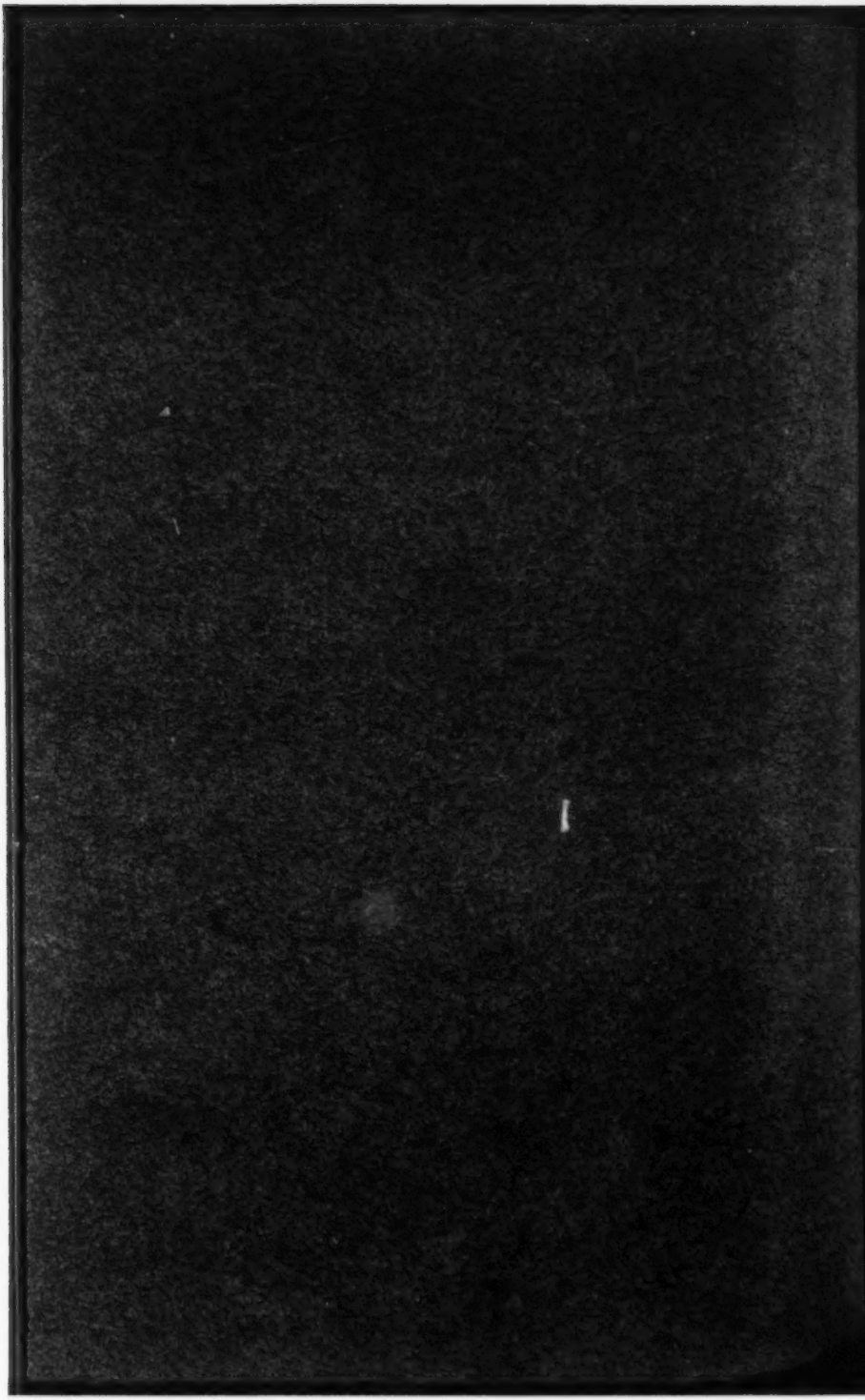

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 180

RALPH WAGNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court wrote no opinion. Its statement made at the conclusion of the trial appears on pages 134–144 of the record. The opinion of the Circuit Court of Appeals (R. 146–150) is reported at 118 F. (2d) 801.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 8, 1941 (R. 150–151). A petition for rehearing was filed May 6, 1941, and denied on May 19, 1941 (R. 151–152).

The petition for a writ of certiorari was filed June 17, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 14, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

The petitioner was convicted of wilfully attempting to evade and defeat his individual income tax for the year 1934. The questions presented are:

1. Whether the petitioner received a fair trial because the conviction was not based upon the "major premise" of the prosecution's case.

2. Whether the circuit court of appeals correctly refused to remand the case to the district court for a new trial, or for consideration of a motion for a new trial, upon the grounds of newly discovered evidence.

STATUTE AND COURT RULE INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680, 724:

SEC. 145. PENALTIES.

* * * * *

(b) Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment

thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution (U. S. C., Title 26, Sec. 145).

Rules of Practice and Procedure, after plea of guilty, verdict or finding of guilt, in Criminal Cases, promulgated by the Supreme Court May 7, 1934:

Rule II. *Motions.* (1) Motions after verdict or finding of guilt, or to withdraw a plea of guilty, shall be determined promptly.

(2) Save as provided in subdivision (3) of this Rule, motions in arrest of judgment, or for a new trial, shall be made within three (3) days after verdict or finding of guilt.

(3) A motion for a new trial solely upon the ground of newly-discovered evidence may be made within sixty (60) days after final judgment, without regard to the expiration of the term at which judgment was rendered, unless an appeal has been taken and in that event the trial court may entertain the motion only on remand of the case by the appellate court for that purpose, and such remand may be made at any time before final judgment.

* * * * *

STATEMENT

The petitioner, Ralph Wagner, during the calendar year 1934 was a rancher at Saugus, Califor-

nia (R. 17, 67–68, 80). On September 13, 1939, he was indicted in the United States District Court for the Southern District of California on charges of wilful attempts to evade and defeat $25,105.79 of an income tax of $26,477.49 due from him for the calendar year 1934 (R. 1–5). The indictment charges that petitioner had a gross income of $100,050.83 during the calendar year 1934 and enumerated specific deductions to which petitioner was entitled, aggregating "$9,276.37, and no more" (R. 2–3); leaving a net income of $90,774.46 (R. 4). It alleges that petitioner, knowing these facts, in his income tax return filed on or about June 15, 1935, willfully reported a gross income of only $16,731.43, with no deductions; in consequence, petitioner's return showed a tax due of only $1,371.70 when in fact he owed a tax of $26,477.49 (R. 4–5). On October 9, 1939, the petitioner pleaded not guilty and waived a jury trial (R. 6).

A partnership return of income for petitioner and Ernest Wagner, and an individual income tax return for the petitioner, were filed on June 15, 1935, for the year 1934 (Exs. 6 and 7, R. 15–16). The partnership return reported net income of $33,462.86 (R. 70), after taking deductions, *inter alia,* of $13,271 for bad debts, and $2,833.80 for depreciation of livestock (R. 72, 73). One-half of such net income, or $16,731.43, was transferred to the individual return of the petitioner (R. 70), and total income taxes of $200 were paid by him in four $50 payments during the year 1935 (R. 16).

The Government presented evidence, which was controverted, indicating that the claim made by the petitioner that a partnership existed between him and his adopted son, Ernest Wagner, was false and that the entire income of the alleged partnership was, in fact, the income of the petitioner (R. 36, 88, 90, 105–106). There was, however, evidence indicating that they considered themselves to be partners (R. 27, 29, 76, 85, 87). The District Court concluded that while the facts did not establish a partnership in law, they were sufficient to raise a doubt whether there was fraudulent intent in claiming that a partnership existed (R. 140).

In addition to the partnership issue, however, the Government proved by uncontroverted evidence that the petitioner had prepared false records in order to take false deductions for bad debts and had taken false depreciation on the cost of livestock. Thus, in order to claim a bad debt deduction, a note from Charles Wagner for $1,765.25, which admittedly was not due, was made on May 20, 1935, but arbitrarily dated May 8, 1930, because the petitioner was in "a little trouble in regard to his tax" (R. 52–53, 58, 63). The petitioner then "aged" the note by carrying it between his sock and the insole of his shoe (R. 59). Another note of Theresa Pettinger, mother of Ernest Wagner, which was claimed as a bad debt (R. 77), was dated back and discolored (R. 82). Deductions also were claimed in the partnership return for depreciation, in the

amount of $2,833.80, based upon the cost and useful life of certain valuable horses owned by the petitioner (R. 22, 24–25, 72). However, the cost figures for various horses, which were based on information furnished by the petitioner (R. 18), were greatly in excess of the actual cost.[1]

An internal revenue agent concluded that the petitioner had received total net income of $91,695.25, on which the tax was $26,477.49 (R. 74). Even if the alleged partnership did exist, the correct tax due from the petitioner therefore was greatly in excess of that reported (R. 16). The petitioner did not testify at the trial, but did call two other witnesses (R. 75–103).

The District Court, finding "deliberate and palpable fraud", found the petitioner guilty as charged in the indictment (R. 134–144), and on February 5, 1940, a sentence of two years in a penitentiary and a fine of $2,500 was imposed (R. 7–8).

On February 6, 1940, the petitioner appealed upon grounds, *inter alia,* that the verdict was con-

[1] The petitioner's falsifications may be tabulated as follows:

Horse	Stated cost	Actual cost
Bert Abbe	$3,500	$550 (R. 42, 72)
Evening Sun	3,500	800 (R. 26, 48)
Jean Morris	3,500	800 (R. 26, 48)
Vide McKinney	500	175 (R. 26, 41)
Calumet Dotty	500	225 (R. 25, 42)
Valencia Dona	500	400 (R. 26, 46)
Annabelle Watts	500	300 (R. 26, 47)

trary to and unsupported by the evidence, and that the District Court erred in denying a motion for a new trial (R. 8–10).

On February 14, 1941, the petitioner filed a motion in the Circuit Court of Appeals for a new trial, or to remand the case to the trial court for a new trial, on the ground of newly discovered evidence (R. 117). This was supported by seven affidavits: (1) Two affidavits dated January 6, 1941, and one dated September 21, 1940, stated that Charles Wagner had told the affiants that he owed petitioner money (R. 118–120, 120–121, 123–125). (2) An affidavit from Theresa Pettinger stated that her note was genuine (R. 127–128). (3) Two affidavits, dated December 30 and October 17, 1940, stated that McPherson, who testified at the trial that he had sold petitioner for $550 the horse which petitioner entered as costing $3,500 (R. 42, 72), had told the respective affiants that the horse in fact cost petitioner $3,500 and that his testimony was incorrect (R. 121–123, 125–126). (4) An affidavit, dated April 26, 1940, stated that one Axcley, who testified against petitioner (R. 56–65), had stated to affiant that he would send petitioner to prison by fair means or foul (R. 128–129).

The petitioner's motion for a new trial, filed in the Circuit Court of Appeals, was submitted and considered in connection with the appeal (R. 145–147). On April 8, 1941, the Circuit Court of Appeals affirmed the judgment of the District Court

(R. 146–151). A petition for rehearing was filed on May 6, 1941, and denied on May 19, 1941 (R. 151–152).

ARGUMENT

I

The petitioner contends that he did not have a fair trial because the government failed to prove fraudulent use of a partnership device (Pet. 5–6, 9, 12–13, 19–20). The argument seems to be that his conviction, based upon fraudulent deductions for bad debts and depreciation (R. 136, 142–144), is invalid because it is not responsive to the major premise of the prosecution, that petitioner fraudulently claimed the existence of a partnership. Petitioner does not urge that there is any want of evidence to support the conviction for fraudulent deductions. His contention is either (a) that there is a fatal variance between the indictment and the proof (see Pet. 5, 9, 12–13) or (b) that the indictment specifically exculpated him from any offense relating to fraudulent deductions (see Pet. 19–20). The contention, in either view, is without merit.

(a) The indictment does not set out the fictitious partnership as the gravamen of petitioner's guilt. It specifies the receipt of a gross income of over $100,000 and enumerates specific deductions of something over $9,000; it charges that petitioner was entitled to these deductions "and no more" (R. 2–3). Proof that petitioner had fraudulently

taken other deductions in the partnership return, which were reflected in the individual return, is within the offense charged by the indictment.[2]

That offense, moreover, is the wilful attempt to evade income taxes, under both the indictment (R. 4) and the statute. Section 145 (b), *supra; United States* v. *Miro,* 60 F. (2d) 58, 60–61 (C. C. A. 2d). Petitioner is not saved from conviction simply because the Government did not prove every example of wilful tax evasion as to which it introduced evidence.

(b) The indictment does not exculpate petitioner of making false deductions. It states simply that on petitioner's *individual* return he claimed no deductons (R. 5). But the false deductions made on the partnership return (R. 20–21, 23, 24, 25) served automatically to reduce the tax due on petitioner's individual return, which reported as his sole income one-half of the partnership income (R. 70). The wilful evasion of taxes is the same whether the false deductions be made in the partnership or the individual return, and the indictment's particularization of the only allowable deductions (R. 4) made it impossible for petitioner to be in doubt that his false deductions were challenged.

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[2] Petitioner, neither in the trial court nor the appellate courts, has attacked the indictment as too general; nor did he demand a bill of particulars. His objection, therefore, is simply one of variance.

(c) Petitioner did not raise his objection in the trial court and did not assign error on this ground (R. 9–11). They were argued as "plain error" in the court below and were correctly rejected as "wholly without merit" (R. 149–150).

II

THE COURT BELOW CORRECTLY DENIED THE PETITIONER'S MOTION TO REMAND THE CASE TO THE DISTRICT COURT FOR A NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE

The judgment of conviction was entered on February 5, 1940 (R. 7–8), and appeal taken on February 6, 1940 (R. 8–10). The sixth ground of the appeal was that the District Court erred in denying the petitioner's motion for a new trial (R. 10). However, that motion was on the grounds that the judgment was contrary to the evidence and the evidence insufficient in support thereof, and that the District Court erred in receiving certain testimony. The motion was denied on February 5, 1940 (R. 132–133). The present motion for a new trial was filed for the first time in the Circuit Court of Appeals more than a year later, on February 14, 1941 (R. 117). Its denial plainly was not reversible error.

(a) Petitioner has wholly failed to exercise the diligence required to secure a new trial on the ground of newly discovered evidence.[3] The sup-

[3] See *Camp* v. *United States*, 16 F. (2d) 370 (C. C. A. 6th), certiorari denied, 274 U. S. 754; *Perry* v. *United*

porting affidavits show that most of the information was brought to the attention of petitioner or his attorneys considerably before the motion was filed on February 14, 1941.[4]

(b) All of the affidavits except one (R. 127–128) consist solely of impeaching evidence of a hearsay nature. The conclusion of the court below that they were insufficient to warrant a new trial is clearly correct. *Johnson* v. *United States,* 32 F. (2d) 127 (C. C. A. 8th); *Isgrig* v. *United States,* 109 F. (2d) 131 (C. C. A. 4th). *Slappey* v. *United States,* 110 F. (2d) 528 (C. C. A. 5th); *Casey* v. *United States,* 20 F. (2d) 752 (C. C. A. 9th), affirmed on other grounds, 276 U. S. 413.

(c) Finally, under Rule II (3) of the Criminal Rules, *supra,* the question of remanding the case to the District Court for a new trial was discretionary with the court below. Cf. *Mattox* v. *United States,* 146 U. S. 140; *Toledo Co.* v. *Computing Co.,* 261 U. S. 399, 421. There was no abuse of such discretion. See *Fairmount Glass Works* v. *Coal Co.,* 287 U. S. 474, 485.

States, 39 F. (2d) 52, 54 (C. C. A. 5th), certiorari denied *sub nom. Capo* v. *United States*, 281 U. S. 769; *Tinkoff* v. *United States*, 86 F. (2d) 868 (C. C. A. 7th), certiorari denied, 301 U. S. 689.

[4] Five of the seven affidavits deal with information so made known between February 20 and July 27, 1940 (R. 126, 125, 129, 123, 121). A sixth was made known "after the trial" (R. 119), and the seventh does not state when petitioner or his attorneys knew of the information (R. 127–128).

CONCLUSION

The decision below is correct. There is presented neither an important question nor a conflict of decisions. It is therefore respectfully submitted that the petition should be denied.

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